

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) and Parts 701 and 703 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**RULING OF THE CHIEF
ADMINISTRATIVE LAW
JUDGE ON MOTION FOR
ISSUANCE OF
SUBPOENA DUCES
TECUM**

- by -

**U.S. ENERGY DEVELOPMENT
CORPORATION,**

DEC File No.
R9-20111104-150

February 4, 2014

Respondent.

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Maureen A. Brady, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Hodgson Russ LLP (Daniel A. Spitzer and Charles W. Malcomb of counsel), for respondent U.S. Energy Development Corporation

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM

By ruling dated December 11, 2013, I directed that in the event respondent U.S. Energy Development Corporation sought issuance of a subpoena duces tecum to be served upon the New York State Office of Parks, Recreation, and Historic Preservation (Parks) in the above referenced matter, respondent must file a motion for such relief with the undersigned Administrative Law Judge (ALJ). Accordingly, by notice of motion dated January 15, 2014, respondent seeks issuance of a subpoena duces tecum as against Parks for the production of documents relevant to the present administrative enforcement proceeding. In support of the motion, respondent has submitted the affirmation of Charles W. Malcomb, dated January 15, 2014, in support of the issuance of the subpoena, with attached exhibits.

In its January 15, 2014, cover letter, respondent's attorney states that the motion was served upon Parks and staff of the Department of Environmental Conservation (Department). Responses to the motion, if any, by Department staff and Parks staff were due to be served within ten (10) days after service of respondent's motion. However, no responses to respondent's motion were served by the January 27, 2014 deadline.

Pursuant to the Department Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]), the scope of discovery is as broad as that provided under article 31 of the CPLR (see 6 NYCRR 622.7[a]). Generally, discovery of documents in the possession, custody, or control of non-parties to a proceeding is conducted through subpoenas duces tecum (see CPLR 3120[1]).

As previously ruled, where, as here, discovery is sought from a State department, bureau, or officer, such as Parks, issuance of a subpoena duces tecum is by leave of the ALJ pursuant to the Department's statutory grant of the subpoena power (see Matter of U.S. Energy Develop. Corp., Ruling of the Chief ALJ on Discovery Requests, Dec. 11, 2013, at 4-5 [citing ECL 3-0301(2)(h)]; see also ECL 71-1709[1]; see generally Matter of Irwin v Board of Regents of Univ. of State of N.Y., 27 NY2d 292, 296-297 [1970]; Matter of Moon v New York State Dept. of Soc. Servs., 207 AD2d 103, 105 [3d Dept 1995]). Pursuant to that authority, a subpoena will be issued where the documents sought are material and relevant in the defense of a proceeding (see CPLR 3101[a]).

Here, neither Parks nor Department staff objects to issuance of the requested subpoena duces tecum. Accordingly, respondent's motion is granted. Respondent is responsible for serving the attached subpoena upon Parks and complying with the remaining requirements of CPLR 3120. Respondent is also responsible for all costs associated with the production and copying of the documents sought (see CPLR 3122[d]).

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Respondent U.S. Energy Development Corporation's motion is granted.

II. A copy of this ruling and of the subpoena issued simultaneously herewith shall be served upon the Commissioner of the New York State Office of Parks, Recreation, and Historic Preservation on or before February 14, 2014.

III. Within twenty (20) days after the service of a copy of this ruling upon the Commissioner, respondent shall pay to the Commissioner of the New York State Office of Parks, Recreation, and Historic Preservation the cost of producing the books, records, and documents required by the subpoena.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: February 4, 2014
Albany, New York